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NO. 83-1917

In the Supreme Court of the United States

OCTOBER TERM, 1983

LIBERTARIAN PARTY OF LOUISIANA,
Petitioner,

VS.

JAMES H. BROWN, SECRETARY OF STATE FOR THE STATE OF LOUISIANA, AND EDWIN A. LOMBARD, CLERK OF THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May the Louisiana Legislature constitutionally require political parties to demonstrate public support before permitting the name of the party on the election ballot.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 4
ARGUMENT 4
CONCLUSION 15
CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

FEDERAL COURT DECISIONS **PAGE**

American Party of Texas v. White,
415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744
(1974) 4, 6

Anderson v. Celebrezze,
460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547
(1983) 5, 11, 14

Arutunoff v. Oklahoma State Election Board,
687 F.2d 1375 (10th Cir. 1982), *cert. denied,*
103 S.Ct. 1892 (1983) 6, 9, 11

Baer v. Meyer,
728 F.2d 471 (10th Cir. 1984) 11

Bullock v. Carter,
405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92
(1972) 4, 5, 8

Clements v. Fashing,
457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508
(1982) 4, 9

Dart v. Brown,
717 F.2d 1491 (5th Cir. 1983) 5, 8, 12

Graver Tank & Mfg. Co. v. Linde Air Products Co.,
336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 (1949) . . . 14

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d
230 (1979) 5

Jenness v. Fortson,
403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d
554 (1971) 4, 6

Libertarian Party of Florida v. State of Florida,
710 F.2d 790 (11th Cir. 1983) 6, 9, 11

Lubin v. Panish,
415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d
702 (1974) 4, 5

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980) 6, 7, 9, 10, 11

Southern Power Co. v. North Carolina Public Service Co.,
263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413
(1924) 13

Storer v. Brown,
415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714
(1974) 5, 6, 8, 13

United States v. Johnston,
268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925
(1925) 13

Williams v. Rhodes,
393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) . . . 5, 8

STATUTES

Louisiana Revised Statutes 18:402D 10
Louisiana Revised Statutes 18:467(4) 10
Louisiana Revised Statutes 18:468 10
Louisiana Revised Statutes 18:1259 B. and C. 3

OTHER AUTHORITIES

12 American Votes 286 (Scannon & McGilliway
ed. 1977) 9

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BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Henry T. Dart, a member of the Libertarian Party, qualified to run for the office of New Orleans City Councilman. Dart's name appeared on the ballot in the February 6, 1982 election. Dart unsuccessfully sought to have his party affiliation follow his name on the February 6 ballot. That controversy brings this case before this Honorable Court.

Dart does not seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Rather, the writ is sought only by the Libertarian Party of Louisiana.

This is not a ballot access case or one in which any other fundamental right is at issue, *e.g.*, the right to vote. Dart was not denied access to the ballot. The Louisiana Election Code allows any and all candidates, regardless of party affiliation or the lack thereof, equal access to the ballot.

However, a legitimate state interest exists in requiring that a political group demonstrate that it has a modicum of support before its member be allowed to designate on the ballot that he is supported by a particular group. The Louisiana Election Code seeks to avoid election confusion, deception and frustration. To permit each individual to purport that he has "party" backing or "party" status which he in fact does not have, affects the integrity of the entire electoral process. That individual is then representing to the electorate that he has a political base of support, a modicum of community support or associational persuasiveness, which he does not have.

Further, because Louisiana has an open primary election system, any person desiring to become a candidate in a primary election may do so by timely filing a Notice of Candidacy and either a qualifying fee or nominating petition. Some candidates may be endorsed by multiple political parties and the very notion of a political party becomes indefinite without some minimal party recognition requirement.

The Louisiana Election Code does not strip a person of his party affiliation. The individual who cannot

demonstrate a modicum of support is merely characterized on the ballot as having no *recognized* party affiliation. A political party name is simply not mentioned alongside the name of the candidate. The candidate may still organize, act or espouse party views. He is *not* required to abandon his party, assume a partisan affiliation he does not desire or masquerade as an independent.

In this important area of state regulation, candidates in presidential elections are treated the same as those in state or local elections. Only those candidates nominated by a recognized political party may list the name of a recognized political party. Louisiana Revised Statutes 18:1259 C. (see Petitioner's Appendix, page 156). The rights of minor party members are protected as they may designate on the ballot the political principle they support. Louisiana Revised Statutes 18:1259 B. (see Petitioner's Appendix, pages 154-56).

Finally, the challenged Louisiana statutes are constitutional as applied. Testimony at trial clearly demonstrated that Louisiana does not seek to protect or maintain a two-party system. Testimony also showed that Louisiana law encourages new and minor parties to seek recognition and that a determination can be made by state voter registration officials at any time whether a party has achieved recognition.

The decision of the Federal District Court for the Eastern District of Louisiana and the three-judge panel of the United States Court of Appeals for the Fifth Circuit are in harmony with relevant decisions of the Supreme Court of the United States (hereinafter "Supreme Court") and other Circuit Courts of Appeals. The courts below properly applied established legal standards. As federal and state

related issues were balanced in favor of the respondent, State of Louisiana, this Honorable Court should deny petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

I. *The decision of the Fifth Circuit Court of Appeals is in harmony with decisions of the Supreme Court and other Circuit Courts of Appeals.*

II. *Ballot access cases require the balancing of federal and state-related issues that is better accomplished by lower courts.*

ARGUMENT

I. *The decision of the Fifth Circuit Court of Appeals is in harmony with decisions of the Supreme Court and other Circuit Courts of Appeals.*

Respondent's petition poses issues that are settled consistently by the Supreme Court and Circuit Courts.

First, it is settled that a state has a compelling interest in regulating the election process and avoiding voter confusion. *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); *American Party of Texas v. White,* 415 U.S. 767, 782 n. 14, 94 S.Ct. 1296, 1307 n. 14, 39 L.Ed.2d 744 (1974); *Lubin v. Panish,* 415 U.S. 709, 715, 94 S.Ct. 1315, 1319, 39 L.Ed.2d 702 (1974); *Bullock v. Carter,* 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972); *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971).

Next, it is readily apparent that a more stringent

level of scrutiny is applied where the complaining *candidate*, rather than the *party*, has been denied access to the ballot. The Fifth Circuit correctly emphasized the distinction between candidate and party access to the ballot and noted that the instant case falls in the latter category. *Dart v. Brown*, 717 F.2d 1491, 1499 and 1501 (5th Cir. 1983).

Thus, petitioner's statement that the less strict standard taken by the Fifth Circuit "is inconsistent with the more demanding standards announced" by the Supreme Court is inaccurate. Cases cited by petitioner[1] as requiring more demanding standards are dissimilar *candidate* access to ballot cases. Even then, as the Fifth Circuit notes at 717 F.2d at 1501, application of the strict scrutiny test appears clearest when other important constitutionally protected rights (such as the right to associate) in addition to candidate access are threatened.

Such additional factors are also present in the two cases cited by petitioner[2] as authority for stricter standards where *both* candidate *and* party access were involved. Moreover, in these two cases, candidates and parties were prohibited from appearing at all on the ballot. In the instant case, Henry Dart, the Libertarian Party's candidate of choice, had access to and in fact was on the ballot.

The case at bar is consistent with Supreme Court

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[1] *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[2] *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979).

opinions that look carefully at the effect of denying a *party* access to the ballot but do not require a more stringent standard of review. The Court has expressly refused to require a state to designate the political party of a candidate. *Jenness v. Fortson, supra,* 403 U.S. 431, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971). The Court has also upheld requirements that condition ballot access on a preliminary significant number or percentage of popular support. *Storer v. Brown, supra,* 415 U.S. at 740, 94 S.Ct. at 1284 (5% requirement not facially unconstitutional); *American Party of Texas v. White, supra,* 415 U.S. at 783 & n. 15, 788-89; 94 S.Ct. at 1307 & n. 15, 1309-10 (upholding statute imposing on minority parties "lenient" 1% requirement which was coupled with other "somewhat burdensome" requirements, and requiring independent candidates to obtain signatures of 3% or 5% depending on office); *Jenness v. Fortson, supra,* 403 U.S. at 432, 442, 91 S.Ct. at 1976 (5% of those eligible to vote in previous election is constitutional).

There is no conflict of authority between the Fifth Circuit and decisions of either other federal courts of appeals or state courts of last resort.

Petitioner states that the Fifth and Eighth Circuits are in disagreement, and cites *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980) (hereinafter "*McLain*"). The decisions of these circuits are consistent. Further, recent opinions of the Tenth and Eleventh Circuits (uncited by petitioner) are in harmony with the Fifth Circuit. *Arutunoff v. Oklahoma State Election Board,* 687 F.2d 1375 (10th Cir. 1982), *cert. denied,* __ U.S. __, 103 S.Ct. 1892 (1983); *Libertarian Party of Florida v. State of Florida,* 710 F.2d 790 (11th Cir. 1983).

In *McLain,* the court found that the decisions of the

United States Supreme Court in the party ballot access field require some heightened scrutiny, and further found that the access statute of North Dakota there reviewed could not withstand such heightened scrutiny. Strict scrutiny as applied in race, alienage and religion cases, was not mandated.

The respondents are completely unable to discern any meaningful distinction between the treatment afforded the North Dakota ballot access statute in *McLain*, and that afforded Louisiana's ballot access statute by the Fifth Circuit in the opinion below. The Fifth Circuit, like the Eighth, did in fact undertake a hard and realistic scrutinization of the ballot access statute presented. The opinion below expressly observed that:

> "Weighing and evaluating...we conclude that the Louisiana statutes in question do not violate appellants' constitutional rights under either the First Amendment or the equal protection clause.... [T]he consequences [of Louisiana's standards for party recognition] are not severe, and appellants' ability to exercise and enjoy their rights under the First Amendment are neither clearly, directly, nor significantly impaired. Though Louisiana treats the Libertarian Party differently from some other parties, it does so solely on the basis of neutral, evenhanded criteria of general applicability....These criteria and the treatment resulting from their application are reasonably calculated and important to the furtherance of strong and legitimate interests of the State....[W]e fail to perceive any significant injury to, or invidious treatment of, appellants under the Louisiana system...."

Dart v. Brown, 717 F.2d 1491, 1510 (5th Cir. 1983).

If there exists any difference at all between these two circuit courts of appeals decisions, it is only in the fact that the Eighth Circuit disapproved North Dakota's ballot access system, whereas the Fifth Circuit has upheld Louisiana's. Yet this circumstance hardly reflects any dispute among the circuit courts regarding ballot access law. Rather, the difference in the results reached merely reflects that the North Dakota system was significantly more restrictive than that provided by Louisiana law.

In a recent comprehensive review of ballot access law provided in a decision of the Supreme Court, Justice Rhenquist observed that:

> "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.' *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 855, 31 L.Ed.2d 92 (1972). 'In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' *Ibid.* In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a 'litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause.' *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. *Ibid., Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968)."

Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 2844, 73 L.Ed.2d 508, 516 (1982). In light of the relatively fluid standard of heightened scrutiny endorsed by this Court and the balancing of multiple factors which is necessary in order to resolve any challenge to a state ballot access restriction, it becomes apparent that different federal courts will inevitably reach different results when examining the access restrictions imposed by different states. Indeed, the Tenth and Eleventh Circuits have recently reached the same result as the Fifth Circuit. See *Arutunoff v. Oklahoma State Election Board*, *supra*, and *Libertarian Party of Florida v. State of Florida*, *supra*, which are discussed at length below.

This inevitability is well illustrated by further comparison of the Eighth and Fifth Circuit Courts of Appeals decisions presented here. In *McLain*, there were two aspects of the North Dakota ballot access system which were found by the Eighth Circuit Court of Appeals to be most significant. These were the number of signatures required to be presented in support of the petition for initial ballot access by new political parties, and the date prior to the election by which such petition had to be filed with state authorities. 637 F.2d at 1164. Under the North Dakota statute there attacked, it was necessary for a new party seeking official recognition to submit 15,000 signatures by no later than June 1 of the election year. 637 F.2d at 1162. Therefore, the 15,000 petition signatures required for ballot access in the year represented a bit more than 5 percent of the 297,188 votes cast for presidential electors at the last preceding election, held in 1976. See, 12 AMERICA VOTES 286 (Scannon & McGilliway ed. 1977). Even though the petition signature requirement for 1978 considered by the Court in *McLain* was slightly more burdensome upon the aspiring new party (when reduced to

a percentage figure) than that which operates in Louisiana, the Eighth Circuit opinion admitted that it was arguably valid under the decisions of the United States Supreme Court, at least if viewed standing alone.

It was, therefore, only when the petition signature requirement in North Dakota was viewed in conjunction with the relatively early filing deadline that the scales of the balance tipped against the North Dakota ballot access regulation. North Dakota's deadline for the petitions was June 1, more than 90 days before the primary election and more than 150 days before the general election. *McLain v. Meier,* 637 F.2d at 1164.

In Louisiana, however, there is no rigid cut off date for registration as being affiliated with a particular party. The Louisiana Election Code does not state just when a party must have five percent of the registered voters affiliated with it in order to be a "recognized" party in a given election. This status can be achieved as late as the close of the period for candidates to qualify for a particular election. For the February 6, 1982 New Orleans City Council election in question in this case, the candidate qualifying period closed December 18, 1981 or fifty (50) days before the election. Louisiana Revised Statutes 18:402D, 467(4), 468.

The additional time permitted to minor political parties to garner the registration necessary for qualification for recognized party status under Louisiana law provides a distinction between North Dakota law and Louisiana law which is far more than merely theoretical. It provides a fairly clear explanation of why the balancing process conducted by the two circuit court of appeals produced different outcomes.

Other features in *McLain* noted by the Fifth Circuit panel that led to a different outcome included Louisiana's unwillingness to require nominees to adopt an independent status or to otherwise publicly espouse a variant political philosophy as well as the Louisiana statute's effect of permitting full ability to vote for the candidate of one's choice. 717 F.2d at 1500-1.

References must be made to Tenth and Eleventh Circuit Court cases holding in the same manner as the Fifth. The Oklahoma statute underlying the decision of the Tenth Circuit in *Arutunoff v. Oklahoma State Election Board, supra*, imposed the significantly later filing deadline for ballot access petitions of July 1. That date is less than 60 days before the primary election. The court refused to impose any definitive general review standard but deemed the election scheme to withstand even close scrutiny. 687 F.2d at 1379. In accord, *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984) (court looked to whether the means adopted were unfairly or unnecessarily burdensome and required state to list party affiliation on voter registration forms as is done in Louisiana).

In *Libertarian Party of Florida v. State of Florida, supra*, the Eleventh Circuit confirmed the many Supreme Court cases finding that states have a compelling interest in regulating the election process and avoiding voter confusion, and stated the following standard of review:

> Thus, the test is whether the legislative requirement is a rational way to meet this compelling state interest. The least drastic means test becomes one of reasonableness, i.e., whether the statute unreasonably encroaches on ballot access. See *Anderson v. Celebrezze*, 460 U.S. at __ & n. 9, 103 S.Ct. at 1570 & n. 9 (1983) (state's important

> regulatory interests are generally sufficient to justify reasonable restrictions).

710 F.2d at 793.

The Louisiana election scheme tallies party registration figures and the Florida election code counts numbers on a petition. However, neither code freezes or stifles changing political affiliation. As noted by the Fifth Circuit below:

> Party affiliation registration or change thereof is not a burdensome procedure under Louisiana law, and it may be accomplished at any time. There are no limits on how frequently one may change registered party affiliation, nor any minimum time which must elapse between changes. Registered party affiliation does not affect the right to vote or run in any election or to sign nominating petitions for candidates. There is no evidence that procuring the requisite number of party registrants is significantly more difficult than procuring a like number of signatures of registered voters on a petition requesting party recognition.

717 F.2d at 1507. Thus, the Louisiana Election Code in like manner to that of Florida provides a reasonable means of access.

What remains most clear is that the Fifth, Eighth, Tenth and Eleventh Circuit Courts have each conducted the necessary balancing and each reached conclusions which are sustainable under the differing circumstances. It follows that there exists no split of authority among the circuit courts. The Fifth Circuit is also in harmony with the

Supreme Court and there is no conflict which would justify an exercise of jurisdiction by the United States Supreme Court.

II. *Ballot access cases require the balancing of federal and state-related issues that is better accomplished by lower courts.*

It has been the consistent and sound policy of the Supreme Court to decline to grant petitions for writs of certiorari in cases which tend to be resolvable more upon their own peculiar facts than upon an application of principles of law. *See* e.g., *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509, 44 S.Ct. 164, 68 L.Ed. 413 (1924).

Yet it may be that there is no field of constitutional doctrine where cases are more likely to turn upon their own peculiar facts and circumstances than the field of ballot access law. This was expressly recognized by Justice White's opinion in the case of *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974), where the Court observed that:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of

> degree', [citation omitted] very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' [citation omitted] What the result of this process will be in any specific case may be very difficult to predict with great assurance."

In accord, *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983).

The requisite balancing of the relevant facts and circumstances, with proper application of the level of scrutiny allowed by the decisions of this Court, has been conscientiously undertaken and performed by both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit. As this Court observed in the case of *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, [a court that] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Libertarian organization in Louisiana has not been denied official political party status because Louisiana ballot access restrictions are unduly burdensome. Rather, they have been denied such status because of the nearly total absence of popular support for their organization among Louisiana voters. 717 F.2d at 1497. All of the factors relevant to this situation have been fully analyzed

and balanced by both of the lower courts which have considered the matter. Accordingly, there is no proper basis for further consideration of such matters by this Court.[3]

CONCLUSION

Petitioner has not established that the lower courts failed to utilize a proper standard of review in evaluating the constitutionality of Louisiana's ballot requirements for minor political parties, or that the Louisiana Election Code unconstitutionally denied ballot access to those parties. A state may constitutionally require political parties to demonstrate public support before permitting the name of the party on the election ballot.

The decisions of the courts below are in harmony with relevant decisions of the Supreme Court and other Circuit Courts of Appeals. The courts below properly applied established legal standards. Finally, federal and state related issues were balanced in favor of the respondent, State of Louisiana. This Honorable Court should deny petitioner's request for a writ of certiorari.

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[3] The petition for writ of certiorari asks the Supreme Court to take judicial notice of certain 1982 elections in Louisiana and introduces for the first time an unverified and unauthenticated table prepared by a plaintiff member alleging to show nationwide registration requirements. This "information," *if* accurate, is outside the record and should be ignored.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari have been served on the parties required to be served under Rule 28 of the Rules of the United States Supreme Court this 9th day of August, 1984.

MAUREEN FERAN FREEDLAND